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Memorial of Commander James McMcIntosh
1843

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THE

MEMORIAL

OF

COMMANDER JAMES Mc McINTOSH,

UNITED STATES NAVY,

FOR COMPENSATION FOR

"PERFORMING THE DUTIES BELONGING TO THOSE OF A HIGHER GRADE,"

FROM THE 14th OF AUGUST, 1837, TO THE 3d OF SEPTEMBER, 1838,

ON BOARD OF THE

FRIGATE CONSTELLATION,

FLAG-SHIP OF THE WEST INDIA SQUADRON,

UNDER COMMAND OF

CAPTAIN ALEXANDER J. DALLAS,

WITH

CORRESPONDENCE AND REMARKS.

NEW-YORK:

PRINTED BY JARED W. BELL, CORNER OF NASSAU AND ANN STREETS.

1843.

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MEMORIAL, ETC.

To the Senate and House of Representatives of the United States, in Congress assembled:

THE MEMORIAL OF JAMES McMcINTOSH, a Commander in the Navy of the United States—*Respectfully Sheweth:*

That, on the fourteenth day of August, in the year one thousand eight hundred and thirty-seven, being of the rank of a Lieutenant, in command of the United States Schooner Grampus, one of the vessels composing the West India Squadron, under the command of Captain Alexander J. Dallas, lying at Pensacola Bay, he received an order from the said Captain Dallas, Commander-in-chief of the Squadron, in the words and figures following:—

"U. S. FRIGATE CONSTELLATION,
Pensacola Bay, 14th Aug., 1837.

"SIR:—You are hereby appointed 'Flag Captain' of the Squadron under my command, and will repair on board of the United States Frigate Constellation forthwith, and assume the duties of that station. You will receive the pay of a Commander.

"Respectfully, your obdt. serv't,
A. J. DALLAS.

"Lieut. Commanding JAMES McMcINTOSH,
U. S. Schooner Grampus."

Your memorialist further showeth, that, in obedience to the said order, he forthwith assumed the duties of Flag Captain of the Squadron, and continued faithfully to discharge the same until the second day of September, in the year one thousand eight hundred and thirty-eight, a period of one year and nineteen days, when the Flag of the Squadron was transferred to the Sloop of War Vandalia, and the Frigate Constellation ordered to the Naval Station at Boston for repairs, under the command of your memorialist, when your memorialist was detached from her by an order of the Secretary of of the Navy.

Your memorialist further showeth, that, on assuming the duties of Flag Captain, the officers and crew of the Frigate Constellation were mustered, and the appointment of your memorialist was read to them by order of the Commander-in-chief, who thereupon issued a Circular, addressed to the commanders of the respective vessels of the Squadron, directing that all reports relating to the duties of the Squadron should thereafter pass through your memorialist, as Flag Captain; and your memorialist also, by direction of the Commander-in-chief, occupied the cabin of the Constellation with himself.

That, during the whole of the period your memorialist was attached to the Constellation, as Flag Captain of the Squadron, orders were issued signed by him as Flag Captain; he was gazetted as Flag Captain in the Army and Navy Chronicle, published at the City of Washington; and some of the orders signed by him as Flag Captain, which were communicated to the Navy Department, became the subject of correspondence between the Secretary of the Navy and your memorialist.

That no objection was made to the appointment of your memorialist until after he had been thus employed more than two months, when a letter was received by the Commander-in-chief from the Honorable the Secretary of the Navy, dated on the 14th of October, 1837, stating that he regretted he had not the power to make the appointment of "Acting Commander." That the Commander-in-chief, believing the Secretary of the Navy to be under a misapprehension of the character of your memorialist's appointment, replied to that letter, stating that he had not conferred on your memorialist the appointment of Acting Commander, but that of Flag Captain of the Squadron, and referred him to a Book of Regulations which had been placed in his hands by the Navy Department when appointed to the command of the Squadron, as his authority for appointing a Flag Captain. That, a long time having elapsed without receiving an answer to that letter of explanation, the Commander-in-chief, on the 22d of December, 1837, addressed another letter to the Honorable the Secretary of the Navy, requesting to be informed of the determination of the Department in relation to your memorialist's appointment, communicating therewith a copy of his former letter; to which the *Acting* Secretary replied, stating that the Secretary of the Navy had already disapproved of your memorialist's appointment—referring, as your memorialist believes, to the letter of the Secretary of the Navy of 14th of the October, 1837, wherein he disapproved of an appointment which was supposed to be an "Act-

ing Commander," but did not disapprove of the appointment of Flag Captain, which the Secretary had the authority to sanction.

Your memorialist further showeth, that the Commander-in-chief, not regarding the letter of the Secretary of the Navy as disapproving the appointment of Flag Captain, notwithstanding the letter of the Acting Secretary, continued your memorialist in that station. That nothing occurred on the subject of your memorialist's appointment until a further period of two months had elapsed, when, in consequence of a note made by the Commander-in-chief on the monthly pay-roll, opposite to the name of your memorialist, a letter was received from the Secretary of the Navy, dated 5th of January, 1838, informing the Commander-in-chief that your memorialist was regarded by the Department, and would be paid, as a Lieutenant Commanding.

Your memorialist further showeth, that, soon after the receipt of the last mentioned letter, a Commander's commission was issued to and received by him, on board of the said Frigate, enclosed in a letter, of which the following is a copy :—

"NAVY DEPARTMENT, March 13th, 1838.

"SIR :—The President of the United States, by and with the advice and consent of the Senate, having appointed you a Commander in the Navy, from the 28th day of February, 1838, I have the pleasure to enclose herewith your commission, dated 9th March, 1838, and numbered five.

"I am, respectfully, your obdt. serv't,

M. DICKINSON.

"Commander JAMES McMCINTOSH,
U. S. Frigate Constellation, Pensacola."

Your memorialist further showeth, that, as soon as he received the said commission, the Commander-in-chief advised the Secretary of the Navy that your memorialist would be continued as Flag Captain, to assist in the discharge of the duties of the Squadron ; and your memorialist was so employed until the 2nd of September, 1838, when the frigate proceeded to Boston as aforesaid.

That at the time your memorialist was appointed Flag Captain he was recommended, by the Surgeon of the Grampus and the Fleet Surgeon, to return to the North for the restoration of his health, which had become much impaired by long service in a tropical climate ; and he was only induced to remain, influenced by the representations of his Commander of the importance of his

services, and to enjoy the advantages resulting from the honorable station to which he had been advanced.

That the Squadron commanded by Commodore Dallas, during the principal part of the time your memorialist served as Flag Captain, consisted of one Frigate, six Sloops of War, one Schooner, three Revenue Cutters, and three Steamers, and the appointment of your memorialist was required in consequence of the arduous and increased duties which devolved on the Commander-in-chief, arising from the nature of the service and peculiar circumstances connected with it, and which, unassisted, he was unable to discharge, as he advised the Secretary of the Navy at the time my appointment was made. The multiplied duties of the Commander-in-chief, arose from the increasing of the Squadron—his co-operation with the army engaged in the Florida war—the protection of American commerce, at that period much exposed from the contest between Texas and Mexico, and the blockading of the ports of the latter power by a French Squadron.

That, simultaneously with detaching you memorialist from the command of the Grampus by the order of the 14th of August, 1837, Lieutenant Engle was appointed by the Commander-in-chief to succeed to that command; and the appointment of Lieutenant Engle was immediately sanctioned by the Secretary of the Navy, as will appear by the records of the Department, about the date of September, 1837.

Your memorialist further showeth, that, about six weeks after his appointment as Flag Captain had been made and reported to the Secretary of the Navy, and after the appointment of his successor to the Grampus had been confirmed, and no direction having been given by the Department in regard to your memorialist—relying on the authority of the Commander-in-chief to make the appointment, and confident of its approval from the length of time that had elapsed without objection, he directed his family to be removed from the City of New-York to Pensacola, where they, at great expense and inconvenience, joined him during the early part of the then next month of November.

That, during the whole of the time your memorialist was attached to the Squadron as Flag Captain, there was no officer on board the frigate superior to himself but the Commander-in-chief: That the frigate, during that time, performed a voyage to Tampico with the Commander-in-chief and your memorialist on board; and during the residue of the period the frigate remained at Pensacola Bay,

known and recognised as being within the limits of the West India station, and the usual place of rendezvous of the Squadron attached to that station for supplies and repairs.

That, at different periods during the time your memorialist was discharging the duties of Flag Captain, four sloops of war attached to the Squadron were commanded by Lieutenants junior to himself, viz: the Boston, commanded by Lieutenant Engle; the St. Louis, commanded by Lieutenant Ward; the Erie, commanded by Lieutenant Farragut; and the Concord, commanded by Lieutenant Adams; all of whom received the pay allowed by law to Commanders attached to vessels for sea service, at the rate of $2500, while to your memorialist, commanding a frigate, there was allowed before his promotion only at the rate of $1800 per annum, and after promotion only at the rate of $2100, the latter being the pay of Commanders or Masters Commandant "on other duty," by the first section of the Act approved March 3rd, 1835, in the following words, "when attached to Navy Yards or on other duty, $2100;" a provision of the same Act declaring, that Commanders shall receive $2500 when attached to vessels for "*sea service.*" One ration was also allowed to your memorialist both as a Lieutenant and as a Commander.

And your memorialist further showeth, that the disallowance of his claim to pay as Flag Captain was communicated to him in the following letter:—

"TREASURY DEPARTMENT,
"Fourth Auditor's Office, Oct. 13th, 1838.

"SIR:—A letter was received at this office a few days since, from the Secretary of the Navy, stating that he enclosed the papers in your case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to was an order from Commodore Dallas, dated August 14th, 1837, appointing you Flag Captain of the Squadron under his command, and the other was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as Flag Captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the Department. To this note I have received the following reply:—'In reply to your letter of yesterday's date, I have to state, that the appointment of Commander J. McMcIntosh by Commodore Dallas to be Flag Captain was not sanctioned by the Secretary of the Navy, nor is such an officer as Flag Captain of any vessel of war

recognised or provided for, either by the old or the new Table of Complements of the different classes of vessels of the United States Navy.' I need hardly say, that it is not in my power to allow you an increase of pay upon the ground of an appointment which thus appears to have been made without sufficient authority.

"I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

"To Commander J. McMcIntosh,
U. S. Frigate Constellation."

Your memorialist further showeth, that he is not in possession of many of the letters relating to the subject, and may not, therefore, in the remarks annexed to his Memorial, correctly state their purport; and as these letters are on the files of the Navy Department, he prays that they may be referred to. The letters annexed, from the Fourth Auditor of the Treasury to the Secretary of the Navy, respectively dated November 15th, 1838, and October 19th, 1840, disclose the Auditor's views at large.

Your memorialist further showeth, that, though the Squadron commanded by Commodore Dallas was not composed of six frigates, it was one of the largest Squadrons ever commanded by any officer of the United States Navy; mounting, in the aggregate, as many guns as if it had been composed of that number of frigates, as appears from a letter from Commodore Dallas to the Secretary of the Navy, to which your memorialist prays reference may be had; and he respectfully submits, that the spirit of the Navy Regulations was not transgressed in his appointment.

Your memorialist further showeth, that, on the 12th of October, 1840, the Honorable James K. Paulding, then Secretary of the Navy, allowed the claim to pay as Flag Captain, in a letter to the 4th Auditor in the following words. "The Claim of Commander "McIntosh, for pay as Flag Captain while serving in that capacity "on board the Constellation under the appointment of Commodore "Dallas, has again been brought to the notice of the Department; "that the Department had lately disallowed this claim on the "ground that in the opinion of the accounting officers of the "Treasury, it could not legally be done: *but that it appearing that* "*there was in fact no law prohibiting the allowance, but a* "*regulation only which might be modified or dispensed with at* "*the discretion of the Department, the claim,* (for the pay of Flag "Captain of the Constellation from the 14th of August, 1837, to the "3d of September, 1838,) *is allowed.*"

Your memorialist further showeth, that on the 19th of October, 1840, the 4th Auditor answered that letter, stating that the allowance of my pay *was in fact against law*, and it was accordingly refused: the letter of the Auditor is annexed.

Your memorialist respectfully submits, that his appointment was *tacitly* sanctioned; that it was a necessary appointment; that having discharged the duties of the station, he is entitled to the compensation allowed by law at the rate of $3500 per annum, and should not be effected by the want of authority in his commander in issuing an order conformable with the *spirit* of the regulation. He further submits that he has been subjected to great expense in his domestic relations, arising from the silence of the Department, an dhas been otherwise prejudiced in his profession in not being permitted to avail himself of opportunities to command Sloops of War attached to the Squadron, to which his juniors in rank were assigned, and enjoy the advantages incident to an independent command.

Your memorialist further showeth, that it is not unusual to appoint Flag Captains to Squadrons, composed of less then six Frigates, that such an appointment was made on the 27th of July 1843, since the claim of your memorialist was rejected, of Commander Hollins, as Flag Captain, to Commodore Dallas at present Commanding the Pacific Squadron, of less force than the Squadron Commanded by the same officer in the West Indies.

Your memorialist further showeth, that the 4th Auditor, in disallowing his claim, attributes it to the error of Commodore Dallas, and refers to it as one of great hardship; if it was an error, the object and result was to advance the efficiency of the Squadron, and if the Department did not design to approve your memorialist's appointment, the disapprobation should have been manifested by a positive order, assigning him to some other station.

Your memorialist therefore prays that the decision of Mr. Secretary Paulding, of the 12th of October, 1840, may be carried into effect, and your memorialist be allowed the pay of Flag Captain, from the 14th of August, 1837, to the 3d of September, 1838, deducting such amounts of pay as he has already received, or that your Honorable body will grant such further and other relief as may seem meet and proper, &c.,

And your memorialist will ever pray.

JAMES M^{C} M^{C} INTOSH,

NEW-YORK, Nov. 23d, 1843. Commander, U. S. Navy.

CORRESPONDENCE, ETC.

U. S. FRIGATE CONSTELLATION,
Pensacola Bay, 14th Aug., 1837.

SIR:—You are hereby appointed Flag Captain of the Squadron under my command, and will repair on board of the U. S. Frigate Constellation forthwith, and assume the duties of that station. You will receive the pay of "Commander."

Respectfully, your obedient servant,
A. J. DALLAS.

Lieut. Commanding JAMES McMCINTOSH,
U. S. Schooner Grampus.

Copy, 22nd Dec. 1837.
Subjoined to Copy of No. 177.

SIR:—Not having received a reply to my last communication, made in relation to Lieutenant McIntosh, I fear it has not been received, and I take the liberty to send a copy of it, with a request that the Department will let me know their determination on the subject. I have the honor to be,

Very respectfully, your obdt. serv't,
A. J. DALLAS.

Honorable M. DICKERSON,
Secretary of the Navy.

NAVY DEPARTMENT, 10th Oct., 1838.

SIR:—Your communication of the 26th ult. has been received. In answer, I have to state, that your papers have been referred to the Fourth Auditor of the Treasury, with a request that he will pay you what the law or the regulations of the service will justify.

Leave of absence will be immediately transmitted to you, according to your request.

I am, sir, very respectfully, &c.,
JOHN BOYLE,
Acting Secretary of the Navy.

Commander JAS. McMCINTOSH,
Boston, Mass.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Oct. 13th, 1838.

SIR:—A letter was received at this office a few days since, from the Secretary of the Navy, stating that he enclosed the papers in your case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to, was an order from Commodore Dallas, dated August 14th, 1837, appointing you Flag Captain of the Squadron under his command, and the other was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as Flag Captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the Department. To this note I have received the following reply: "In reply to your letter of yesterday's date, I have to state, that the appointment of Commander J. McMcIntosh, by Commodore Dallas to be Flag Captain was *not* sanctioned by the Secretary of the Navy, nor is such an officer as Flag Captain of any vessel of war recognised or provided for, either by the old or the new Table of Complements of the different classes of vessels of the United States Navy." I need hardly say, that it is not in my power to allow you an increase of pay, upon the ground of an appointment which thus appears to have been made without sufficient authority.

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

To Commander J. McMcINTOSH,
U. S. Frigate Constellation.

BRIDGEPORT, (Conn.,) 5th Nov., 1838.

SIR:—I have to-day received a letter from the Fourth Auditor of the Treasury, in regard to my pay as Flag Captain to Commodore Dallas, which has not a little astonished me; for, on my arrival at Boston, I received from Mr. Boyle, then acting as Secretary of the Navy, a communication, stating that my papers had been referred to the Fourth Auditor of the Treasury, with the request that he would pay me what the law or the regulations of the service would justify; from which I inferred that the appointment which had been conferred on me by Commodore Dallas was sanctioned, and the Fourth Auditor of the Treasury requested to make or allow the pay of such appointment; for the pay of every officer is perfectly well known, and a reference elsewhere, than to the Purser of the ship or station,

I should not have considered necessary, except when claims for extra service or some such cause was agitated. As regards the situation I have held since the 14th of August, 1837, in the Squadron under the command of Commodore Dallas, I have simply to state, that I have been as much the Captain of the Constellation, as Commander Armstrong was of the Macedonian, or Lieutenant Stribling of the Peacock, both of whom, I understand, have received the additional pay. Of the former I can speak confidently, for he told me so at Boston; the latter I only know from report, coming, however, from the best authority. Am I, then, I would respectfully ask, to be deprived of the additional pay because my Commander, (unfortunately it would appear,) placed the word "Flag" before "Captain," when I have faithfully and diligently, as he has been pleased to say to the Department, performed all the duties which devolved on a Captain; or is it probable he would have done me so great an act of injustice as to have retained me on board the Constellation as a Lieutenant, when my juniors were in command of sloops of war, receiving Commander's pay? Or, let me again, with due respect, ask, what act of mine, since I have had the honor of serving in the Navy, would authorize the belief that I would silently have submitted to such an arrangement? I have never, in any instance, waived, in the slightest degree, anything like rank, or ever shrunk from any responsibility calculated to bring me before my government and the public? When I do, I wish to be considered unworthy of any emolument. But I believed, as did my Commander, that, in consideration of his extensive command, and the multiplicity of his duties, the Department would see the necessity of his being aided in the discharge of them, and my services would be appreciated. We were both strengthened in that opinion, when the late Secretary of the Navy was pleased to say, I might be allowed Lieutenant Commandant's pay: for, with such pay, I was acknowledged as having commanded something. I was then attached to the Constellation, and if the law allowed me anything extra, it was the pay of Commander; and so soon as I was promoted, Commodore Dallas informed the then Secretary of the Navy, in an application he made for the command of the Pensacola Yard, that he would still retain me on board the Constellation; at the same time requesting, should he be ordered to that Yard, that I might also receive orders to that station. This letter was written by the Commodore himself, and not copied by his secretary, but was put in my hands for perusal, and, as far as my recollection serves me, was not marked as "private."

Receiving no reply, and no objection being made to my remaining in the Constellation, and various communications having been sent to and acknowledged by the Department, signed by me as Flag Captain, and all letters received from the Department coming to me as attached to the Constellation, the appointment I considered sanctioned. I appeal, sir, to you, with great confidence, and must request you to look into the case with your well known determination to award justice, and I shall not be apprehensive of the result. The situation in which I have been placed by executing the orders of my superior, an officer of high rank and acknowledged merit, is a peculiar one.

I was taken from the command of the schooner Grampus on the 14th August, 1837, and ordered to the Constellation as his Captain, with orders to the Purser to pay me as a Commander. This the Honorable Secretary of the Navy was immediately informed of. And at this time the Boston was commanded by Lieutenant Engle, my junior in service, receiving Commander's pay. I continued in the execution of the duties assigned me, without objection being made by the Department, until late in October, when a letter was received under date the 14th of that month, (two months elapsing between the dates of my appointment and the Secretary's letter,) stating that the Department had no power to sanction an *acting appointment as Commander*. I was directed to continue in the execution of the duties by Commodore Dallas; and he informed the Secretary of the Navy that he had not given me an acting appointment as Commander, but ordered me to aid him, as his Flag Captain, in his duties, which had become too multiplied for him to give the attention necessary to them. Some two months again elapsed, when the Commodore was informed by the Department, that Lieutenant Commandant's pay might be allowed me. In the meantime, I had lost command of the Boston, and with it the advantages. Again, as I before stated, on my promotion, the Commodore informed the Department that I should be retained on board the Constellation; and I have been, until she anchored off Charlestown Navy Yard. In what light, then, could I be viewed, but as her Commander? I conceive of none other; could I have done so, I should have taken the Erie, commanded for the last three months by Lieutenant Farragut, and would, as he has done, have benefitted by the present state of commerce in Mexico. I have thus, sir, gone over my case, with what I am afraid you may consider a tedious detail; but I consider it as absolutely necessary to a thorough understanding of

it. It has been my good fortune to be almost constantly employed since first I entered the Navy; but I must say, I have not been equally fortunate in obtaining what others have received for similar services; and in saying so, I disclaim the most distant disposition to be disrespectful; and I rest the case in your hands, believing justice will be awarded.

I have the honor to be, &c., &c.,

JAMES Mc McINTOSH,
Commander.

To the Honorable JAMES K. PAULDING,
Secretary U. S. Navy.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Nov. 15th, 1838.

SIR:—I have had the honor to receive the letter addressed to to you on the 5th inst., by Commander McIntosh, which was referred by you to this office, with a request that I would report the distinction between his case and those of Commander Armstrong and Lieutenant Stribling, alluded to in that letter.

Commander Armstrong was expressly *ordered by the Department to take command of the Frigate* Macedonian. Commander McIntosh had no such order; but merely received from Commodore Dallas, what purported to be an acting appointment as "Flag Captain of the Squadron," and upon that ground applied for the pay of a superior grade. Upon inquiry of the Acting Secretary of the Navy, whether the apointment was sanctioned by the Department, I was informed that it was *not*; and he furthermore observed, that "such an officer as "Flag Captain," of any vessel of War, was not recognised or provided for, either by the old or new Table of Complements of the different classes of vessels of the U. S. Navy." It was, therefore, determined by this office, that Mr. McIntosh, could have no allowance as "Flag Captain." He is understood now to claim the pay of a Commander from the 4th of August, 1837, when he was ordered by Commodore Dallas to the Constellation, until his promotion to the rank of a Commander, and the pay of a Captain from that time until he left the vessel.

The case of Lieutenant Stribling, also is easily distinguishable from that of Mr. McIntosh. It appears from a certificate of Commodore Kennedy, and from a letter addressed by Lieutenant Stribling on the 12th December, 1837, to the Secretary of the

Navy, to whom the question had been referred from this office, (which, as the claim was subsequently sanctioned by the Department, I conclude must have contained a correct statement of facts,) that Commodore Kennedy, on the 9th of Febuary, 1835, requested that Lieutenant Stribling, might be ordered to the Peacock, for the purpose of being appointed by him Commander, if he should think necessary, and that in consequence of such request, he, (Lieutenant S.,) was ordered to that vessel; that the command was accordingly assigned to him by the Commodore on the 24th of April, 1835, and that he performed the duties belonging to the station, until the 7th of November, 1837; that although, subsequently to the appointment, a letter was written to Commodore Kennedy, by the Secretary of the Navy, stating that the Department did not agree with him as to its necessity, the letter contained no direction to rescind it, and even if it had, the communication was never received by the Commodore, and could, therefore, have had no effect upon the arrangement which had been made. Lieutenant Stribling also appeared by an entry upon the rolls of the vessel, to have been in command during the period in question.

It is unnecessary for me to point out the difference between the case, thus stated, and that of Mr. McIntosh, who, so far as appears, received no appointment as Commander of the Constellation, but claims an increase of pay as having Commanded that vessel under an appointment, made without the sanction, express or implied, of the Navy Department, to another office which had no existence. If he shall produce the evidence required by the rules of this office, to show that he *actually performed* the duties of Commander of the Constellation, his claim will be allowed; but as it was held by your predecessor, and has been adopted as a rule in this office, that before an officer can be allowed the pay of a superior grade, under the act of March 3d, 1835, it must appear that, including himself, there was not more than a complement of officers of such superior grade on board the vessel in which the service is alleged to have been performed, and as it is stated in the Table of Complements, issued by the Navy Department on the 28th of January last, that when the Commander of a Squadron is also the Commander of a particular vessel, he is to be borne as part of her complement. I have requested, in a letter addressed to you a day or two since, to be informed whether Commodore Dallas, was the Commander of the Constellation as well as of the Squadron, during the period embraced by Mr. McIntosh's claim; since, if he were,

the additional pay applied for cannot under any circumstances be granted. The letter of Mr. McIntosh, which you referred to me is herewith returned.

I have the honor to be sir,

Very respectfully, your obedient servant,

A. O. DAYTON.

To the Hon. J. K. PAULDING,
Secretary of the Navy.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Nov. 29th, 1838.

SIR:—It would afford me great pleasure to allow your claim to increased pay while on board the Constellation, if I thought it could be done consistently with law and the regulations of the Navy Department. Upon a careful examination of the precedents in this office, however, I do not perceive that there is any case analogous to yours, in which the allowance has been made; and you must certainly be in error, when you suppose that you are refused, what others under the same circumstances, have received. You are also mistaken in the opinion which you appear to entertain, that the Table of Complements recognises a "Flag Captain" to a Squadron of the force commanded by Commodore Dallas. The Table does indeed recognise a "Captain of a Fleet," but it is only "when authorized by the Regulations of the Navy." Those Regulations, since the 1st of September, 1834, confine that office to a Squadron composed of at least six ships not below the rate of frigates; and, even then, the appointment requires the sanction of the Secretary of the Navy.

The cases of Commander Armstrong and Lieutenant Stribling, to which you refer, are not similar to yours. Mr. Armstrong was expressly *ordered by the Department to the command* of the Macedonian, and Commodore Jones to the command of the expedition. Commodore Kennedy requested that Lieutenant Stribling might be ordered to the Peacock, for the *purpose of being appointed by* him *Commander* of that vessel, if he should think it necessary; and Mr. Stribling was ordered accordingly, which was construed into an implied consent by the Department to his appointment, and a detaching of Commodore Kennedy, for the time, from the command of the ship. You seem to think that it is a mere point of *form* which excludes you from the increase of pay you ask; but it is not so. Even supposing Commodore Dallas to have intended, by appointing you Flag Captain, to make you the Commander of the

Constellation, your case still differs from those you have cited as precedents, in two important respects:—

1. The appointment never had the sanction of the Department: and,

2. Commodore Dallas was himself the Commander of the Constellation, and she consequently had her complement without your appointment. Upon application to the Navy Department, since I received your last letter, to know whether the Commodore formed a part of the complement of the Constellation, or was borne in addition to her complement, I have been informed that he was ordered to that particular vessel, and that all the returns which have been received of the officers attached to her, represent him as her Captain. I believe I have already informed you, that by a rule of this office, adopted at the suggestion of the Secretary of the Navy, no officer is considered as entitled to the pay of a superior grade, unless it appears that, including himself, there was not more than a complement of officers of such superior grade on board the vessel in which the duty was performed.

I have made this explanation, in the hope of satisfying you, that your claim was disallowed from a strict sense of duty and not from want of proper consideration, much less from a disposition, (as you would seem to ~~insinuate~~,) to make a distinction between yourself and others similarly situated: and I have only to add, that as in this case, so in all others which may come within the sphere of my official duties, it is my firm and conscientious determination to administer equal and impartial justice to the best of my ability, without the least regard to the individuals concerned.

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

To Commander JAMES McMCINTOSH,
U. S. Navy, Bridgeport, Conn.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Dec. 8th, 1838.

SIR:—The circumstances stated in your letter of the 2nd instant, have served to confirm me in the opinion which I previously entertained, that *your case is a hard one;* but I do not perceive that they present any ground upon which, confined as I am by law and the regulations of the Navy Department, I can afford you relief. Commodore Dallas no doubt supposed that he had a right to appoint you "Flag Captain," but in this he was mistaken; which

mistake is doubtless the real source of the hardship of which you complain. Even the Regulation in the "Red Book," to which you refer, did not authorize the appointment, except with the sanction of the Secretary of the Navy, which in this instance was not given; but that Regulation was long since repealed, so far as it allowed a Flag Captain to a Squadron of less force than six frigates. I think you will agree with me, upon further reflection, that Lieutenant Stribling's case and yours are, in the main point, dissimilar. The Navy Department certainly had a right to direct, that, at any period of the cruise, Lieutenant Stribling should take command of the Peacock, and that Commodore Kennedy should thenceforth command the Squadron only, and to leave this period to be fixed on by the Commodore. The consent of the Department to such an arrangement was strongly implied by the order given to Lieutenant Stribling to join the vessel, upon the particular application made by Commodore Kennedy. But in your case no sanction, express or implied, was given to the appointment made by Commodore Dallas. On the contrary, it was expressly refused. When, in addition to this, it is considered that your appointment was one which *could not* be sanctioned by the Department consistently with its own regulations, I think the difference between the two cases becomes plain and striking. I have only, therefore, to repeat my regret, that an error was committed which you seem to suppose has had the effect to place you, in one respect at least, in a worse situation than others who were your juniors in the service.

In relation to your allotments, which you state were stopped on the 1st November, be pleased to inform me *where* and by what *Purser* they were registered, and by what agent they were payable.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES McMcINTOSH,
U. S. Navy, Bridgeport, Conn.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Dèc. 18th, 1838.

SIR:—Your application for an increase of pay, is one upon which I come to an adverse decision with so much reluctance, and the observations I have since made to you on the subject, have been received with so much candor, that I am unwilling to leave you in doubt as to any of the considerations, by which I felt myself forced to that determination.

In your last letter, you state that you are at a loss to perceive how I could be of opinion that no sanction, express or implied, was given by the Navy Department, to your appointment, when the Secretary, in a letter to Commodore Dallas, expressed his willingness that you should receive the pay of a Lieutenant Commanding. *I confess that this communication of the Secretary, is inexplicable by me, and I can only regard it as an anomaly.* I think it very clear, however, that it was not intended as a sanction to your appointment, either as *Flag Captain* or *Commander of the Constellation.* In either of those cases, you would have been entitled to more than the pay of a Lieutenant Commanding, and yet the Secretary refused to give his consent to your receiving more. This act, of itself therefore, it appears to me, shows rather his unwillingness than his willingness, to sanction the appointment. But when taken in connexion with his previous declaration, that he could not sanction your appointment as "Commander," and with the subsequent declaration that it had not been sanctioned, I do not see how I could attach to the circumstance, the meaning and force to which you think it entitled. The more I reflect upon the subject, the more I am convinced that you have received even a larger allowance, than a strict application of the law and regulations would warrant, although had I possessed an equitable discretion, I should certainly have been induced to allow you more.

I remain sir, very respectfully, your obedient serv't.

A. O. DAYTON.

To Commander JAMES McMcINTOSH,
U. S. Navy, Bridgeport, Conn.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Feb. 9th, 1839.

SIR:—I received your letter of the 3d inst. If you will turn to the printed Regulations of the Navy, you will see it expressly stated, that no advance is allowed to officers on a voyage to Pensacola. I communicated your desire, however, to the Secretary of the Navy, who merely referred me to the rule on the subject.

I meant to be understood by Captain Boerum, that I believed you were convinced, that *this office* had no power to grant you the increased pay for which you applied, and this I think I had a right to infer from your letter of the 11th December, in

which you observe. "I dare say the views you have taken in regard to my claim are correct, and drop the subject with the Department;" notwithstanding you stated, at the same time, that you were not satisfied *in regard to an anomaly of the late Secretary of the Navy, which I did not attempt to explain, and which I presume no one could explain,* but which, on that very account, could not reasonably be expected to have any influence upon my decision.

I am sir, respectfully, your obedient servant,

A. O. DAYTON.

To Commander JAMES McMcINTOSH,
U. S. Navy, Bridgeport, Conn.

TREASURY DEPARTMENT,
Fourth Auditor's Office, Aug. 14th, 1839.

SIR:—In the settlement of the account of John De Bree, Purser of the Frigate Constellation, you have been charged on the books of this office with two hundred and four dollars ninety-five cents, the difference between the pay of commander on "*sea service,*" as paid by the Purser from the 28th February to 2nd September, 1838, and the pay of the same grade for the same time "*on other duty,*" as allowed at this office. There is one dollar standing to your credit for balance of pay from 1st August to 15th September, 1827, which leaves due from you $203 95. I have, therefore, to request your early attention to the subject, otherwise the Purser at Pensacola will be directed to check it from your pay.

I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

Commander JAMES McMcINTOSH,
U. S. Navy, Pensacola.

NAVY DEPARTMENT, 13th Nov., 1839.

SIR:—Your letter of the 21st ult. has been received. The decision of the Fourth Auditor, disallowing your claim to the sea pay of a Commander, after your promotion to that rank, and while you were on board the Constellation with Commodore Dallas on the West India Station, was concurred in by the Department. For the reasons upon which it was made, you are referred to a letter from

the Auditor, which was enclosed to you by the Department on the 4th of December last. No new facts in the case have since been adduced, and the Department cannot reconsider it.

I am, very respectfully, your obedient servant,

J. K. PAULDING.

Commander JAMES McMcINTOSH,
U. S. Navy Yard, Pensacola.

NAVY DEPARTMENT, 26th Sept., 1840.

SIR:—Your letter of the 31st July last was duly received. If you will again submit your claim to increased pay while on board the Constellation, the Department will reconsider the decision which has been had upon it.

I am, very respectfully, your obedient servant

J. K. PAULDING.

Commander JAMES McMcINTOSH,
U. S. Navy, New-York.

(*Copy.*)

TREASURY DEPARTMENT,
Fourth Auditor's Office, Oct. 19th, 1840.

SIR:—I have the honor to acknowledge the receipt of your letter of the 12th instant, informing me that "the claim of Commander McMcIntosh, for pay as Flag Captain, while serving in that capacity on board the Constellation, under the appointment of Commodore Dallas, had been again brought to the notice of the Department; that the Department had lately declined allowing this claim, on the ground, that in the opinion of the Accounting Officers of the Treasury, it could not be *legally* done; *but that, it appearing that there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the Department*, the claim, (for pay as Flag Captain of the Constellation from the 14th of August, 1837, to 3d of September, 1838,) *was allowed.*"

It has always been my desire, in conducting the business of the office committed to my care, to conform to the wishes and opinions of the Navy Department, whenever such conformity appears to me to involve no violation of the duties imposed upon me by law: and

if the responsibility for the decision of this case, could be legitimately transferred from this office to your Department, I should readily acquiesce in the determination you have announced.

The view of the question which you have recently communicated, has led me to give it a careful reconsideration, but I am of opinion, that the duty and responsibility of deciding it, rest upon the accounting officers of the Treasury, and from its origin, I have acted upon that conviction. It was never referred by me to the Navy Department for determination, nor did I ever suppose that I had the right so to refer it. On the contrary, the reference was from your Department to this office, as appears by your letter of the 6th of October, 1838; in which you inform me that you "inclose the papers in the case of Commander McIntosh, and requested that I will pay him what the law or regulations of the service will justify." On the 11th, of the same month, I addressed a note to Mr. Boyle, then acting Secretary of the Navy, requesting that, in order to enable me to decide upon this claim, I might be informed whether the appointment of Commander McIntosh by Commodore Dallas to be Flag Captain of the Squadron under his command was sanctioned by the Department; to which I received an answer on the next day, that "the appointment of Commander McIntosh by Commodore Dallas to be Flag Captain, was *not* sanctioned by the Secretary of the Navy," *and furthermore*, that "such an officer as Flag Captain of any vessel of war, was not recognised nor provided for, either by the old or the new Table of Complements of the different classes of vessels of the U. S. Navy." Being in possession of this information, and of the regulations of the Navy Department, one expressly prohibiting the appointment of a Flag Captain to any Squadron, without the sanction of the Secretary of the Navy, and another prescribing that no Flag Captain should in any case be recognised, unless the Squadron should consist of six ships not below the rate of Frigates, I was prepared to decide upon the claim, which I accordingly proceeded to do. The decision, together with the grounds upon which it rested, was subsequently communicated to you, in compliance with a call which you made upon me for a report upon the subject. As in your recent letter, you treat the opinion of the "accounting officers of the Treasury," that the allowance claimed by Commander McIntosh could not be *legally* made, as incorrect, and allege, that "*there is in fact no law prohibiting the allowance, but a regulation only, which may be modified or dispensed with at the discretion of the Department*," I beg leave to

make the following observations in support of the opinion which I have heretofore expressed.

The Act of Congress of March 3d, 1835, entitled "an act to regulate the pay of the Navy of the United States," prescribes the compensation of the various classes of officers therein mentioned, among which are Commanders or Master Commandants and Lieutenants; providing *that officers temporarily performing the duties belonging to those of a higher grade shall receive the compensation allowed to such higher grade, while actually so employed,* and it expressly declares that the yearly allowance provided in that Act is "all the pay, compensation, and allowance, that shall be received, under any circumstances whatever, by any such officer, except for travelling expenses." During a part of the period in question, Mr. McIntosh was a Lieutenant, and during other part he was a Commander, and he has been allowed the pay specified in the Act as belonging to those classes of officers. Unless, then, it should appear that, during the time embraced by the claim, he was actually performing the duties of a grade superior to his own, by which he would be brought within the terms of the provision above cited, *I cannot be wrong in asserting, that there is, in fact, a law prohibiting* the additional allowance which he claims. *The case turns upon the single question of fact, whether he performed, during the period in question, the duties of a grade superior to his own.* He alleges, as the foundation of his claim, that he performed the duties of a Flag Captain on board the Constellation, the principal vessel of the West India Squadron. *The first thing necessary to make out his case was to show, that there was such a grade; for if it did not exist, he could not have performed duties pertaining to it. Now, he not only failed to shew that there was such a grade, but the Acting Secretary of the Navy expressly informed me that it did not exist;* and the regulations of the Navy declared that it could not exist, in a Squadron of the force of that commanded by Com. Dallas. Besides, even if the Squadron had been of sufficient size to admit of a Flag Captain, which it confessedly was not, the appointment could not have been made by the Commanding Officer, without the sanction of the Secretary of the Navy; and, in the present case, the letter of the Acting Secretary states, positively, that such sanction was not given. It appears that, after Commodore Dallas had ordered Lieutenant McIntosh to act as Flag Captain, he informed the Department of the fact, and that he had directed the Purser to pay him as Commander.—The payment thus directed was disallowed by the Secretary, after a

reference to Mr. Pickett, then Fourth Auditor, for his opinion on the subject. *This was in August* 1837; and on the 5th of January, 1838 the Secretary *expressly* informed Commodore Dallas that he could not recognise Lieut. McIntosh as a Commander but was willing *to regard and pay him as Lieutenant Commanding* which pay he receives. The department, therefore, instead of being silent upon the subject, actually refused to sanction the appointment of Flag Captain; inasmuch as the lowest compensation to which he would have been entitled in that capacity, would have been the pay of a Commander. After Mr. McIntosh had been promoted to the office of Commander, Commodore Dallas, in August, 1838, wrote again to the Department, stating that he, (Mr. McIntosh,) had been retained on board the Constellation in the performance of the same duties as before, and asking how he was to be paid; *to which communication it is believed no answer was ever given, owing probably to an idea entertained by the Secretary, that his views upon the subject had been sufficiently expressed in his previous communication.*

But had the Department remained altogether silent, the case, in my view, would not have been altered. It must be admitted, I think, without any hesitation, that the appointment made by Commodore Dallas, was in the first instance, wholly unauthorized and illegal; for although, like other commanders on Foreign Stations, he had a general authority to confer acting appointments, he certainly had no power to *create* the officres to which the appointments were to be made, which he must have done in this case, inasmuch as, by the regulations of the Navy then existing, a Flag Captain was not allowed to a Squadron of the size of that which he commanded. Of an act thus done, without a shadow of authority, he had no right from the silence of the Department to infer its approbation; but he was, upon correct principles, bound to infer the contrary. A *positive* order or declaration of the Department, at least, was requisite to make a proceeding valid which was before invalid. The principle, so far as I am aware, has never been admitted by any jurisdiction, that an illegal act on the part of an inferior officer, may be legalized by notice to his superior, and by the omission of the latter to express his disapprobation.

I think it clear, therefore, that agreeably to the law and regulations of the Department as they existed at the time the service was performed, the claim of Commander McIntosh to the pay of Flag Captain is not well founded. The only question remaining is, whether, agreeably to an intimation contained in your letter, the as-

sent of the Department, *now* granted, gives him a better title than he before had. There is no doubt that the Department has a right to modify or dispense with its own rules *prospectively, but it admits of serious question, to say the least, whether a rule canb e made, altered, or repealed* to affect a previous transaction in which the rights of an individual, or of the government, are concerned, and thus to produce the effect of an *ex post facto* law. I do not consider it necessary, however, in the decision of this case, to determine that point; for any change, at the present time, of the rules which operated to prevent Commander McIntosh from receiving the pay of Flag Captain, at the time when the services for which he claims were performed, would be, in effect, an alteration of the Act of Congress; as it would so enlarge its operation, as to include, within certain of its provisions, an officer who, before such change, was avowedly excluded; a power which the Legislative authorities of the country alone can exercise.

I have thus presented my views of this case somewhat at length, induced by a sense of respect and duty towards the Department, for the purpose of explaining the necessity which, under the opinions I entertain upon the subject, compels me to withhold that action, on the part of this office, which may be requisite for the satisfaction of the claim; and in the hope that the reasons which led to its rejection on a former occasion, thus laid before you more fully than they have ever before been, may yet approve themselves to your own judgment; more especially, as, in the case of Commander Boerum, who, under similar circumstances, applied to Congress for relief, they received the sanction of a Committee of the House of Representatives.

I have the the honor to be, sir, very respectfully,

Your ob't. serv't.

(Signed,) A. O. DAYTON.

To the Hon. J. K. PAULDING,

Secretary of the Navy.

REMARKS.

In appealing to Congress for relief, I beg leave to submit the following examination of the objections assigned by the Accounting Officers of the Treasury, in rejecting my claim, as disclosed in the letters annexed to my Memorial, and others on file in the Navy Department.

Before proceeding to consider the claim for pay as Flag Captain, a few observations are offered on the subject of what is deemed an incorrect allowance of Commander's pay, at the rate of $2100 per annum and a ration, as stated in the Memorial, instead of $2500 and a ration, properly due. The decision is communicated in the following letter:—

"TREASURY DEPARTMENT,
"Fourth Auditor's Office, Aug. 14th, 1839.

"SIR:—In the settlement of the account of John De Bree, Purser of the Frigate Constellation, you have been charged on the books of this office with two hundred and four dollars and ninety-five cents, the difference between the pay of commander on "*sea service*," as paid by the Purser from the 28th February to 2nd September, 1838, and the pay of the same grade for the same time "*on other duty*," as allowed at this office. There is one dollar standing to your credit for balance of pay from 1st August to 15th September, 1827, which leaves due from you $203 95.* I have, therefore, to request your early attention to the subject, otherwise the Purser at Pensacola will be directed to check it from your pay.

"I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

"Commander JAMES McMCINTOSH,
U. S. Navy, Pensacola."

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* "$203 95 was paid to Purser White, on the 18th August, 1839."

By the preceding letter it appears, that I was charged at the Treasury Department with $204 95, being the difference of pay of Commander "*on sea service*," paid by the Purser, and the pay of the same grade "*on other duty*," allowed on the settlement of my accounts. Relating to this subject, the Act, entitled, "An Act to regulate the pay of the Navy of the United States," approved March 3rd, 1835, contains the following provisions:—

"Commanders or Masters Commanding:" "When attached to vessels *for sea service*, $2500;" "When attached to Navy Yards, *or on other duty*, $2100;" "One ration per day only shall be allowed to all officers *when attached to vessels for sea service.*"

During the period embraced between the 28th of February and 3rd of September, 1838, I held a Commander's commission; and though attached to the Flag-Ship of a Foreign Squadron, in actual service, and performing in her a voyage to sea, am refused the pay appointed by the Act for a Commander attached to a vessel "*for sea service*," and allowed that only, of a Commander "*on other duty*:" thus pronounced by the Auditor to be "on other duty;" in effect, not attached to the Frigate Constellation, though, also, my accounts were kept by the Purser of that ship.

The decision is not extraordinary, alone, from the clear and explicit terms of the Act, that a Commander attached to a vessel for "sea service" shall receive $2500 per annum, but from the anomaly it presents in allowing the *sea ration*, besides the pay of $2100 "on other duty;" virtually thereby admitting, that I was "attached to a vessel for sea service," as the ration, by the express language of the Act, belongs only to officers "attached to vessels for sea service." The allowance of the ration establishes the *nature* of the employment; it must be received as evidence that I was attached to a vessel for "sea service," and places me within the first branch of the Commander's pay-bill; in other words, entitles me to the pay of $2500 per annum.

Test the Auditor's decision by the provision of the Act, under which he allows me at the rate of $2100 per annum, and it will be found equally erroneous, viz.:—Commanders "when attached to Navy Yards, or *on other duty*, $2100;" by that employment I am not allowed the ration, as "sea service" is essential to that allowance, the Act declaring, the officer entitled to the ration is he, only, who is attached to a vessel for "sea service."

By what reasoning the Auditor arrived at his decision, I cannot conjecture, unless on the assumption that Commodore Dallas, having

transcended his powers, the order was void, and did not operate to attach me to a vessel "for sea service."

First. I contend, that the Auditor is estopped from taking that exception, as the allowance of the ration, with the approbation of the Navy Department, sanctions the appointment so far forth as to attach me to the ship.

Second. The Secretary of the Navy, by letter of the 5th of January, 1838, (five months after the date of my orders to the Constellation,) stated, that I was regarded as Lieutenant Commanding; thereby recognising me, before my promotion, to be attached to that vessel. Not having been detached after promotion, but continued in the discharge of the same duties as before, of which the Secretary had notice, it cannot be said that the order of Commodore Dallas did not attach me to the Constellation, whatever may be the effect of the alleged original absence of authority, as it regarded the particular appointment of Flag Captain, hereafter to be considered.

The order of Commodore Dallas relieved me from the command of the Grampus, and placed me somewhere; I contend, attached me to the Constellation, as the order appoints; the Auditor thinks, it put me "on other duty."

The confirmation of my successor's appointment to the Grampus, without any provision or direction by the Department affecting me, confirmed me, by implication, in the station to which the Secretary was advised the Commander-in-chief had assigned me, and precludes the Auditor from denying, (if irregular "*ab initio*,") that the irregularity was not cured by subsequent sanction. Either I was attached to a vessel "for sea service," entitled to pay at the rate of $2500 and a ration, and consequently the sum of $204 95 was erroneously disallowed, or I was "on other duty," and had no claim to the ration.

The objections to the claim for pay, as Flag Captain, from the 14th of August, 1837 to the 3rd of September, 1838, will next be considered, reviewing, more particularly, the letters annexed from the Auditor to Mr. Paulding, respectively dated November 15, 1838, and October 19th, 1840, and one to myself, of prior date, October 13th, 1838, those letters treating the subject most at large.

"TREASURY DEPARTMENT,
"Fourth Auditor's Office, Oct. 13th, 1838.

"SIR:—A letter was received at this office a few days since, from the Secretary of the Navy, stating that he enclosed the papers in

yuor case, and requesting that you might be paid what the law or regulations of the service would justify. One of the papers referred to, was an order from Commodore Dallas, dated August 14th, 1837, appointing you Flag Captain of the Squadron under his command, and the other was a letter of the same officer on the subject. Inferring from these papers that you claimed an increase of pay as Flag Captain, I addressed a note to the Acting Secretary of the Navy, inquiring whether your appointment had been sanctioned by the Department. To this note I have received the following reply: "In reply to your letter of yesterday's date, I have to state, that the appointment of Commander J. McMcIntosh by Commodore Dallas, to be Flag Captain, was *not* sanctioned by the Secretary of the Navy, *nor is such an officer as Flag Captain of any vessel of war recognised or provided for, either by the old or new Table of Complements of the different classes of vessels of the United States Navy.*" I need hardly say, that it is not in my power to allow you an increase of pay, upon the ground of an appointment *which thus appears to have been made without sufficient authority.*

"I am, sir, respectfully, your obedient servant,

A. O. DAYTON.

"To Commander J. McMcIntosh,

U. S. Frigate Constellation."

From the context of the preceding letter, the expression, "an appointment which *thus appears* to have been made *without sufficient authority*," has a double aspect; the Auditor's inquiry was, whether the appointment had been sanctioned, and the *Acting* Secretary replied, that it was *not* sanctioned. The want of "sufficient authority," therefore, was, that the appointment "was not sanctioned." It also embraces the other objection presented by the Acting Secretary, that such an officer "as Flag Captain of any vessel of war *was not recognised or provided for*, either by the *old* or *new* Table of Complements of the different classes of vessels of the United States Navy."

The Auditor, in saying "it *thus* appears," refers to all the reasons against allowing the claim, which *appeared* in his letter, antecedent to that conclusion, and he adopts both objections assigned by the Acting Secretary, to wit, as well *that the grade of Flag Captain, was not recognised*, as that my particular appointment had not been sanctioned.

It is proper first to ascertain, whether the objection second in order, in the Auditor's letter, is well taken, as it clearly follows, if the grade of Flag Captain was not recognised, the question of sanction becomes entirely unimportant.

In stating that such officer as "Flag Captain of any *vessel of war*" was not recognised, the Acting Secretary doubtless intended to be understood, that such officer as Flag Captain *of a Squadron* was not recognised, else the answer is not responsive to the inquiry, the subject of which was, the appointment of Flag Captain of the *Squadron* under the Command of Commodore Dallas, as expressed in the order set forth in the first page of the memorial.

Usage in the Naval service, though affording abundant evidence, need not be resorted to, to establish the extraordinary error of the Acting Secretary, in saying that the grade of Flag Captain was not recognised, when the regulations are so explicit. I refer to the Red Book, chap. 37, adopted by Mr. Secretary Woodbury, now repealed.

"Section 1. Every Commander of a Squadron, upon a foreign station, is authorized to appoint a *Flag Captain*, or to *select any officer*, to perform the duties, under the sanction of the Secretary of the Navy. The appointment without sanction is prohibited."

That regulation disposes of the Acting Secretary's objection, so far as regards the *old* Table of Complements.

The Auditor approves the view of the Acting Secretary, that the grade was not recognised, not alone by adopting it as the ground of his decision, but in his letter to the Secretary of the Navy of the 19th of October, 1840, makes it the turning point of my case, he says: "The case turns upon the single question of fact, whether he performed, during the period in question, the duties of a grade superior to his own. He alleges that he performed the duties of Flag Captain on board of the Constellation, the principal vessel of the West India Squadron. *The first thing necessary to make out his case, was to show that there was such a grade*, for if it did not exist, he could not have performed the duties pertaining to it; *now he not only failed to show that there was such a grade, but the Acting Secretary of the Navy expressly informed me that it did not exist*, and the regulations of the Navy declared it could not exist, in a Squadron of the force of that Commanded by Commodore Dallas."

There is an inconsistency in the Auditor's views: he says, I not only failed to show that there was such a grade, but the Acting

Secretary expressly informed me that it did not exist, *arguendo* assuming, that as there was no such grade, I did not perform the duties pertaining to it; in support of that view, quoting the Acting Secretary as authority: yet in the next passage he admits the existence of the grade, under certain circumstances, and thus destroys the authority of the Acting Secretary, who broadly, without limitation, or qualification, asserts, that "such an officer as Flag Captain of any vessel of war was not recognised or provided for, either by the *old* or *new* Table of Complements of the different classes of vessels of the United States."

That the old regulations recognised and provided for a Flag Captain, appears from the regulation above quoted, and establishes the little reliance to be reposed in the Acting Secretary's knowledge of the subject, who seems to place the propriety of rejecting my claim, more on the ground, that there was no such grade, than that the appointment had not been sanctioned, the non-existence of the grade being the gist of his letter.

That the accuracy of the Acting Secretary is not wholly to be relied on, the regulation adopted on the 20th of January, 1838, is also referred to.

"The following persons may also be borne, in addition to the complement of vessels in which the Commander of a Squadron is borne, namely, a *Captain of a Fleet when authorized* by the *regulations* of the Navy, &c."

The regulations therein referred to, require that the Squadron should be composed of six Frigates, when entitled to a Captain of a Fleet or Flag Captain. The preceding extract is only quoted to establish, that the grade *is recognised* by the *new* Table of Complements, the declaration of the Acting Secretary to the contrary notwithstanding.

That a Captain of a Fleet is there used synonomous with Flag Captain, is, I presume, not disputed, and affords authority for the recent appointment of Commander George N. Hollins, as Flag Captain of the Squadron now Commanded by Commodore Dallas on the Pacific station.

"NAVY DEPARTMENT, July 27th, 1843.

"SIR:—You will proceed to New-York, and report to Captain Stringham for a passsge in the United States Frigate Savannah, and on your arrival in the Pacific, you will report to Commodore

A. J. Dallas, for the Command of that ship, as his Flag Captain, it being his wish that you should be ordered in that capacity.

"I am, respectfully, your obedient serv't,
DAVID HENSHAW.

"To Commander GEORGE N. HOLLINS,
U. S. Navy, Washington, D. C."

In stating that the above regulation afforded authority for the appointment of Commander Hollins, I am not strictly correct, it affords authority for the appointment of Flag Captain, *aided* by the *dispensing* power of the Secretary, on this occasion exercised as respects the *force* of the Squadron, that in the Pacific not being composed of six Frigates, indeed being of inferior force to that commanded by the same officer in the West Indies, to which I was attached.

On the rejection of the claim, a correspondence ensued, between Mr. Secretary Paulding and myself, extending to several letters. On the 13th of November, 1839, Mr. Paulding informed me that the decision of the Auditor was concurred in by the Department; and added, "No new facts in the case have since been adduced, and the Department cannot reconsider it." On the 31st of July, 1840, I again addressed Mr. Paulding, to which he replied:—

"NAVY DEPARTMENT, 26th Sept., 1840.

"SIR:—Your letter of the 31st July last was received. If you will again submit your claim for increased pay while on board the Constellation, the Department will reconsider the decision which has been given upon it.

"I am, very respectfully, your obedient servant
J. K. PAULDING.

"Commander JAMES McMCINTOSH,
U. S. Navy, New-York."

The claim was again accordingly submitted, and, on the 12th of October following, *allowed*, in a letter from Mr. Paulding to the Fourth Auditor, in these words: "The claim of Commander McIntosh, for pay as Flag Captain while serving in that capacity on board the Constellation, under the appointment of Commodore Dallas, had been again brought to the notice of the Department; that the Department had lately declined allowing this claim, on the ground that, in the opinion of the accounting officers of the Treasury, it

could not be *legally* done; but that it appearing, *that there was in fact no law prohibiting the allowance, but a regulation only,* which might be modified or dispensed with, at the discretion of the Department, the claim, (for pay as Flag Captain of the Constellation, from the 14th of August, 1837 to the 3rd of September, 1838,) *was allowed.*" I have not a copy of that letter, but furnish the preceding extract, as quoted, in the letter or opinion of the Auditor in reply, dated October 19th, 1840, annexed.

To that decision of the Secretary, which I supposed was final, the Auditor, in reply, stated, "*there is in fact law prohibiting the allowance,*" a conclusion arrived at by the following argument:

That the Act of March 5th, 1835, "prescribes the compensation of the various classes of officers therein mentioned, amongst which are 'Masters, Commanders, and Lieutenants Commanding;' providing *that officers temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade, while actually so employed*; and it expressly declares, that the yearly allowance provided in that Act is 'all the pay, compensation, and allowance, that shall be received, under any circumstances whatever, by any such officer, except for travelling expenses.' During a part of the period in question, Mr. McIntosh was a Lieutenant, and during other part he was a Commander, and he has been allowed the pay specified in the Act as belonging to those classes of officers. Unless, then, it should appear that, during the time embraced by the claim, he was actually performing the duties of a grade superior to his own, by which he would be brought within the terms of the provision above cited, *I cannot be wrong in asserting, that there is in fact a law prohibiting* the additional allowance which he claims."

The Auditor thus presents the proposition, and asserts that the allowance is against *law, an Act of Congress, in contra-distinction to a regulation adopted by the Navy Department;* whereas, in truth, the objection to my being embraced in the provision of the Act, that "officers temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade," arises from my being appointed Flag Captain of a Squadron composed of less than six Frigates, that being the *force* required by the regulation, to entitle a Squadron to an officer of that grade; and it is confidently believed, that the allowance of my claim would conflict only with a *regulation of the Navy Department,* and not with an Act of Congress, as the Auditor supposes.

That the appropriate duties of Flag Captain were performed, cannot be denied; that those duties pertained to a higher grade than that of Commander, or Lieutenant Commanding, and that the grade is recognised by the regulations of the Navy, is equally true; but it is denied that the Squadron was so composed as to be entitled to a Flag Captain, which by regulation, not law, must be composed of six Frigates. Hence, the allowance of pay was prohibited by a *regulation only*, which might be modified or dispensed with by the head of the Department, and not "in fact prohibited by law," as the Auditor decided. That the regulation may he dispensed with, is obvious from principle; that it may be, we have the declaration of Mr. Paulding, and the practice of the present Secretary in the the appointment of Commander Hollins.

Mr. Paulding was correct in stating, that "there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with, at the discretion of the Department." Having official discretion, he removed the disability which the regulation interposed, and decided to allow the claim. All that remained for the Auditor was purely *ministerial.*

It is submitted, that though the *letter* of the regulation may have been transgressed, it was not so in *spirit*, as the Squadron mounted as many guns as if composed of six Frigates.

Having established that the grade was recognised, I will proceed next to consider whether the appointment was sanctioned.

I was in command of the Grampus, by order of the Secretary of the Navy, when the order of the 14th of August, 1837, was issued. Simultaneously, Commodore Dallas ordered Lieutenant Engle to succeed me in that command. My appointment as Flag Captain, and that of Lieutenant Engle to the command of the Grampus, were forthwith communicated to the Navy Department; the appointment of Lieutenant Engle was immediately, in writing, confirmed, *and no notice whatever taken by the Department of the disposition which had been made of me.*

As a legal proposition, I claim, that, in sanctioning the appointment of a successor to a station which I had occupied, by order of the Navy Department, (the vacancy being created by an order assigning me to another station,) without noticing my removal, virtually sanctioned my appointment, with the same efficacy as a *material act.*

The argument may be advanced, that, inasmuch as the Secretary *acted* on one part of the change, and omitted to do so in regard to

the other, the inference is, that the other part of the arrangement was not approved. That argument is neither sound in principle nor safe in practice, and would lead to endless confusion. What would be the effect in this particular case? My command was given to another, and, (assuming my appointment not to be sanctioned,) *there is no disposition made of me;* I am, consequently, without position. It is wholly incompatible with the system and good order of the public service, that an officer should be removed from a station assigned by the head of the Department, by an officer subordinate to that head, and thus be ***lost sight of***, as it were, *discarded from the supervisory regard of that Department*, and cannot be presumed. The solution, rather, is, that, as I had been removed from a station to which *an order of the Department* had assigned me, it occurred to the Secretary that such change required confirmation *as respected my successor;* hence, the express sanction; whereas, my appointment, removing no one, interfering with no one, was tacitly approved. The inquiries of "what had become of Lieutenant McIntosh? "For what object had he been removed?" would naturally be suggested to the mind of the Secretary, on confirming the appointment of my successor, answered by the communications of the Commander-in-chief. *Thus informed, not forbidding, by legal presumption approved;* the alternative involves the censure of the Department, in imagining that I was overlooked, and is not to be adopted where it may be consistently avoided; and is not to be *presumed*, in disposing of my rights. The reasons for making my appointment were communicated to the Department; and as I was permitted to occupy the station, gazetted in the Army and Navy Chronicle, issuing orders in that capacity without objection, until the 14th of October, 1837, a period of two months, "I cannot be wrong in asserting," that the appointment was sanctioned by a *collateral act.*

I have assumed, in these remarks, and so stated in the Memorial, that no objection or allusion to my appointment was made, prior to the 14th of October, 1837. If in this I am in error, I positively assert, that such objection was not communicated to Commodore Dallas or myself. It is, however, proper to refer to a passage in the Auditor's letter of the 19th of October, 1840, in part conflicting with that statement. He says, "It appears, that after Commodore Dallas had ordered Lieutenant McIntosh to act as Flag Captain, he informed the Department of the fact, and that he had directed the Purser to pay him as Commander. The payment thus directed, was disallowed by

the Secretary, after a reference to Mr. Pickett, the Fourth Anditor, for his opinion on the subject. *This was in August*, 1837; and on the 5th of January, 1838, the Secretary *expressly informed* Commodore Dallas, that he could not recognise Lieutenant McIntosh as a Commander, but was willing to recognise him as Lieutenant Commanding, which pay he has received."

The Auditor says, the payment thus dircted, was referred by the Secretary to Mr. Pickett; that Mr. Pickett gave his opinion, on which the Secretary disallowed the pay. In the computation of short time, the reference by the Secretary to Mr. Pickett, the opinion or report of the latter, and the judgment of the former, is of much importance, the numerous engagements of those functionaries considered. My orders are dated 14th of August, 1837, at *Pensacola*, and it is doubted whether they could have been transmitted to *Washington*, and those proceedings had, before the expiration of the month, admitting that the indefinite date of "August, 1837," related to the last day of that month. It would have been more satisfactory had the *particular* date of the Secretary's decision on Mr. Pickett's report been given, with the Auditor's usual precision. Again, it seems rather extraordinary that the opinion of an accounting officer should, in *advance*, be required. At that time, the increased pay had neither been earned nor required. At all events, if such decision was made, and not communicated to Commodore Dallas or myself, it cannot be invoked to impair this claim. That it was not communicated, appears from my asseveration, and may be inferred from the remark of the Auditor in the next passage, that on the 5th of January, 1838, the Secretary *expressly informed* Commodore Dallas, that he could not recognise Lieutenant McIntosh as a Commander, but was willing to recognise him as a Lieutenant Commanding. The expression, "expressly informed," from the context, excludes the idea that the decision on Mr. Pickett's report was ever communicated to me. I shall, therefore, in considering the question of sanction, assume that the Secretary's letter of the 14th of October, 1837, made the first allusion to my change of employment.

In that letter, the Secretary expressed his *regret* that it was not in his *power* to make an "*Acting Commander*." Commodore Dallas at once replied, that he had not appointed me "Acting Commander," but had appointed me *Flag Captain*. To the Commodore's letter no reply was received, and he again wrote, communicating a copy of his previous letter:—

Copy, { "22nd Dec. 1837."
Subjoined to Copy of No. 177.

"SIR:—Not having received a reply to my last communication, made in relation to Lieutenant McIntosh, I fear it has not been received, and I take the liberty to send a copy of it, with a request that the Department will let me know their determination on the subject.

"I have the honor to be,
Very respectfully, your obdt. serv't,
A. J. DALLAS.

"Honorable M. DICKERSON,
Secretary of the Navy."

This letter was not replied to by the Secretary in person, with whom the previous correspondence had been held, and who was possessed of all the facts, but by the *Acting* Secretary, who stated, that the Secretary had already disapproved my appointment.

From the preceding state of facts, I contend, that the appointment of *Flag Captain* had not been disapproved. The objection of the Secretary, on the 14th of October, 1837, was under a misapprehension of the Commodore's order, which he supposed appointed an "*Acting Commander.*" If he intended that letter as disapproving the appointment of *Flag Captain*, he would so have expressed himself. Had he not been under a misapprehension, it is to be assumed, from the tenor of his letter, in connexion with the Commodore's letter, *presenting his reasons for making the appointment*, that he would not have objected. The Secretary expressed his regret at not having authority to make an "Acting Commander;" and the intendment is, that, in expressing such regret, he admitted the expediency of an Acting Commander's appointment, but did not make it, *owing alone to the want of authority.* That reason was paramount for declining to approve of what he supposed was the appointment of *Acting Commander*, but not that of *Flag Captain*, manifestly within the scope of his authority, the necessity of which was sufficiently disclosed in the Commodore's communication.

That this is not a sophistical deduction, may reasonably be concluded, from the fact that Commodore Dallas, immediately on the receipt of the Secretary's letter, suggested the misapprehension, and continued me in the discharge of the like duties as before, and I was permitted so to remain, without further notice from the Department. If the deduction is not sound, what inference is to be derived from the unbroken silence of the Department, after the explanation, but that the explanation was satisfactory, and the Department con-

curred in the expediency of my appointment? Still the Acting Secretary, in reply to Commodore Dallas's letter of the 22nd of December, stated, that the Secretary had already disapproved of it. When had he so disapproved? His only letter on the subject, was that of the 14th of October; in it the appointment of Flag Captain was not even mentioned. The Secretary rejected the want of authority to make the appointment of "Acting Commander," and did not touch my case, as I held an appointment of a totally different grade; and I respectfully maintain, the *Acting* Secretary was wholly mistaken in saying, that the Secretary had already disapproved of my appointment.

Again, the subject remained without the action of the Department, until the 5th of January, 1838, when it was brought to light by a note on the pay-roll opposite my name, and the Secretary informed the Commodore that he "*was willing to regard and pay me as Lieutenant Commanding.*" In August, 1838, after my promotion, Commodore Dallas advised the Department, that I would be continued in the discharge of the duties of Flag Captain, *to which no answer was given*, and I was thus employed, until I sailed in the Frigate for Boston. The reason assigned by the Auditor for the Secretary's silence is thus stated: "After Mr. McIntosh had been promoted to the office of Commander, Commodore Dallas, in August, 1838, wrote again to the Department, stating that he, (Mr. McIntosh,) had been retained on board the Constellation in the performance of the same duties, and asking how he was to be paid, to which communication it is believed no answer was given, *owing probably to an idea entertained by the Secretary, that his views upon the subject, had been sufficiently expressed in his previous communication.*"

To which communication the Auditor refers, (he speaks in the singular number,) I do not understand. To that of the 14th of October, 1837? I have shown it did not relate to the matter, but to the office of "Acting Commander." To that of 5th of January, 1838? To it there could be no sensible application, (adverse to the claim,) as the circumstances had materially changed when the Commodore wrote in August, 1838, in the meantime I having been advanced to the rank of Commander, and it could not have been contemplated to keep me on board the Constellation, in a rank inferior to my commission. Those were the only letters from the Secretary.

I cannot think, a reply was not given "owing probably to an idea entertained by the Secretary, that he had sufficiently expressed

his views," as suggested by the Auditor. The Secretary would hardly permit an officer of the rank and standing of Commodore Dallas, to move in doubt on a subject of official duty, when respectfully addressed, for the punctilious reason that he supposed he had already been sufficiently explicit, especially as the consequences were flowing on, and would only be arrested by a reply. I am unwilling to attribute that lack of courtesy to the head of a Department. If, however, the silence was designed for the reason assigned by the Auditor, the truth of the reason becomes important, as if the Secretary had not "sufficiently expressed his views," my appointment was impliedly sanctioned, and entitles me to the compensation allowed by law. I most confidently refer to the Secretary's letter of the 14th of October, 1837, with Commodore Dallas's reply and letter of 22nd of December, 1837, together with the Acting Secretary's rejoinder, and maintain, with respect, that these letters far more sanction than disapprove the appointment, for the reasons I have stated, especially so, when reinforced by the letter of August, 1838, to which there was *no reply.*

It may be said, there is an obstacle to be overcome in the Secretary's letter of the 5th of January, 1838, stating that I was to be *regarded and paid as Lieutenant Commanding;* instead of offering an obstacle, *that letter establishes the claim,* as will be presently shown, as a legal consequence. If that letter is to have a *retrospective operation,* it relates back to the date of my orders on the 14th of August, 1837, and the Secretary meant to be understood to say, "Mr. McIntosh has been regarded as Lieutenant Commanding from the time he was ordered to the Constellation, and is to be paid as Lieutenant Commanding from that time."

If the order was *prospective,* and is considered as refusing to sanction my appointment, it cannot affect the five previous months of my employment as Flag Captain.

Here I stand, on the broad platform of the law, and would cheerfully appeal to a court of justice to establish, that the act of Congress entitled me to *Captain's pay,* the moment the Secretary decided that I was regarded as Lieutenant Commanding the Frigate Constellation. The points involved in that decision are few and simple.

1. I was "regarded" *Lieutenant Commanding a Frigate.*

2. A Frigate is the appropriate Command of a *Captain.*

3. In performing the duties of Lieutenant Commanding a *Frigate,* I temporarily performed the duties belonging to the grade of *Captain.*

4. The Act of Congress, approved March 3rd, 1835, provides that "officers temporarily performing the duties belonging to those of a higher grade, shall receive the compensation allowed to such higher grade, while actually so employed."

5. The compensation is established in the second of the following provisions of that act, (to be inteligible both are necessarily quoted.)

"All other Captains when in Command of *Squadrons* on foreign stations, $4000."

"When *on other duty*, $3,500."

The duties which I performed as Lieutenant Commanding, were those belonging to the grade of Captain, not "commanding a Squadron on foreign service," but "on other duty."

With whatever confidence I might appeal to a court of justice to establish my claim, it has not, however, met the favorable consideration of the Auditor, who thus summarily disposes of my appointment as "Lieutenant Commanding." In his letter of the 18th of December, 1838, he says: "I confess that this communication by the Secretary is *inexplicable by me, and I can only regard it as an anomaly.*" Again, in his letter of the 9th February, 1839, he says: "Notwithstanding you state, that you were not satisfied in regard to an anomaly of the late Secretary of the Navy, which I *did not attempt to explain, and which I presume no one could explain*, but which, on that very account, could not reasonably be expected to have any influence on my judgment."

The "anomaly" consists in recognising me as "Lieutenant Commanding" a Frigate, and allowing me the pay of "Lieutenant Commanding" a vessel of that class usually commanded by Lieutenants, (Brigs and Schooners,) notwithstanding the Act provides, that, "officers performing the duties belonging to those of a higher grade, shall receive the compensation of such higher grade, while so actually employed."

In correct parlance, rather than an *anomaly*, the order should be considered an *inconsistency*, there being such contrariety, that both the rank and the limited pay cannot subsist together, the pay of Captain following the duties of "Lieutenant Commanding" a Frigate. As both parts of the order cannot stand together, the Auditor, in his capacity of accounting officer, finds authority to nullify the Act, in denying me the compensation to which the first branch of the order entitled me under the Act.

My claim under that letter became vested, and could not be disposed of, on the score of its being *anomalous* or inconsistent. If

the Secretary committed an error, that error should inure to my advantage and not prejudice, as I performed the duties required of me. *It is indeed an anomaly, that the Government should set up its own anomaly to defeat my claim.*

It was the province of the Secretary to appoint me Lieutenant Commanding the Constellation; so much of his act is valid and effectual. He coupled the appointment with a direction as to the pay to be received; that regulation of my pay was void and ineffectual; it was *official legislation.* So much of the order as was within the legitimate authority of the Secretary, should be sustained, and was executed by me; such part as transcended his power, was inoperative. It is not to the Navy Department that I am to refer, to ascertain the appropriate pay of a particular grade, but to the Act of Congress. The Act is the common guide, as well of the Secretary as myself. The moment I was recognised as Lieutenant Commanding the Frigate Constellation, the claim to Captain's pay sprang into existence, under the Act of Congress. With the same propriety the Secretary might direct that Captains should receive the pay of Midshipmen, as that Lieutenants Commanding should receive less than Congress has appointed.

To prevent misapprehension as to the appropriate grade to command a Frigate, as a matter of law, independent of usage, I cite the Act of February 25th, 1799, 1 Story, p. 563, sec. 1: "Be it enacted, that all vessels in the service of the United States, *mounting twenty guns and upwards, be commanded by Captains;* those not exceeding eighteen guns, (except galleys, which are to be commanded as heretofore provided by law,) by Masters or Lieutenants, according to the size of the vessel, to be regulated by the President of the United States."

Either the Secretary's order, or declaration, that I was regarded Lieutenant Commanding the Constellation, was impracticable, and a dead letter in all its parts, or I am entitled to its full effect, as regards that part within the scope of his authority, it belonging to him to make the appointment as Lieutenant Commanding. If it is a dead letter, it was without efficacy for *any* purpose, and should not be brought in judgment against me, to establish that my original appointment as Flag Captain had been *thereby* disapproved.

One other objection of the Auditor. He says, in a letter to Mr. Paulding, of the 15th of November, 1838, "If he shall produce the evidence required by the rules of this office, to show that he actually performed the duties of Commander of the Constellation,

his claim will be allowed; but as it was held by your predecessor, and has been adopted as a rule of this office, that before an officer can be allowed the pay of a superior grade, under the Act of March 3rd, 1835, it must appear that, including himself, there was not more than a complement of officers of such grade on board the vessel in which the service is alleged to have been performed, and as is stated in the Tables of Complements, issued by the Navy Department on the *28th of January last*," (1838,) "that when the Commander of a Squadron is also the Commander of a particular vessel, he is to be borne as part of her complement."

To that objection the answer is, that the Department could, at its discretion, modify or dispense with its own rules, and did so, by the tacit sanction of my appointment as Flag Captain, and did so, in saying I was regarded as Lieutenant "Commanding" the Frigate. It was as competent for the Department to appoint me Lieutenant Commanding the Frigate, notwithstanding Commodore Dallas was borne as part of her complement, and dispense with the regulation quoted, as it was competent for the present Secretary to appoint Commander Hollins Flag Captain of the Pacific Squadron, composed of less than six Frigates, notwithstanding the regulation provides that a Squadron is not entitled to a Flag Captain, which is not thus composed. In both cases, the Department had plenary powers.

Also, a perfect answer is, that my appointment of Flag Captain bears date on the 14th of August, 1837, and cannot be affected by a regulation adopted on the 28th of January, *five months after the appointment was made.* Again, the letter of the Secretary, recognising me Lieutenant Commanding, bears date the 5th of January, 1838, and that rank cannot be affected by a regulation dated on the 28th of January, 1838, *twenty-three days after.* So far as regarded that regulation, my rights had become absolute, and could not be defeated by it.

Whether that regulation was to operate prospectively, or otherwise, my case was not affected by it. The regulation did not, "*per se*," detach me from the ship; it did not affect, *of itself*, the object to be accomplished, *but required to be carried into execution by an order from the Department.* As no order to that effect was issued, the principle established by the regulation was not made to apply to me. This proposition is too plain to require argument in support of it.

I think I have now shown, that the reasons assigned for rejecting my claim, are not sustained by the Rules and Regulations of the

Navy, or the Act of Congress establishing the pay-bill. The statement of the *Acting* Secretary, that "such an officer as Flag Captain of any vessel of war is not recognised or provided for, either by the old or new Tables of Complements of the different classes of vessels," is plainly contradicted by the *old* as well as the *new* Regulations. That the appointment is within the *spirit* of the regulation, may truly be said, as the Squadron to which I was attached mounted as many guns as if it had been composed of six Frigates. That the appointment was impliedly sanctioned by a *collateral* act, in confirming the appointment of my successor to the Grampus, and that it was so, by the silence of the Department, notwithstanding the direct course pursued by Commodore Dallas in pressing a a decision, is fully supported by the most familiar principles of law. "That in fact there was no law, but a regulation only, which might be modified or dispensed with by the Department, and was so dispensed with by Mr. Paulding, is equally plain; and that, in regarding me as "Lieutenant Commanding" the Constellation, I became entitled to pay as *Captain*, the Acts of Congress establish.

Before concluding the review of the Auditor's objections, it is proper to advert to his legal propositions. After arguing that the appointment had not been sanctioned, he says: "But, had the Department remained altogether silent, the case, in my view, would not have been altered. It must be admitted, I think, without any hesitation, that the appointment made by Commodore Dallas was, in the first instance, wholly unauthorized and illegal; for although, like other commanders on Foreign Stations, he had a general authority to confer acting appointments, he certainly had no power to *create* the offices to which the appointments were to be made, which he must have done in this case, inasmuch as, by the regulations of the Navy then existing, a Flag Captain was not allowed to a Squadron of the size of that which he commanded. Of an act thus done, without a shadow of authority, he had no right from the silence of the Department to infer its approbation; but he was, upon correct principles, bound to infer the contrary. A *positive* order, or declaration of the Department, at least, was requisite to make a proceeding valid which was before invalid. The principle, so far as I am aware, has never been admitted by any jurisdiction, that an illegal act on the part of an inferior officer, may be legalized by notice to his superior, and by the omission of the latter to express his disapprobation."

The preceding summary of the Auditor's views, is, I think, replete with propositions, novel and unsound. Can it be imputed to Commodore Dallas, that he *created an office* in making my appointment? The regulation created and established the office. At most, the Commodore transgressed the letter of that regulation. Nor is it consonant with established principles of law, to say, "He had no right, from the silence of the Department, to infer its approbation. A *positive order*, or *declaration* of the Department, at least, was required, to make a proceeding valid which before was invalid." It is conceded, on all hands, that the Department had the power to dispense with its own regulations; and I contend, as a principle of law, that my appointment could as effectually be sanctioned by silence after notice, as by a material act. The Auditor adds: "The principle, so far as I am aware, has never been admitted *by any jurisdiction*, that an *illegal* act on the part of an inferior officer, may be legalized *by notice* to his superior, and by the omission of the latter to express his disapprobation."

If my claim is to be disposed of on the proposition, that an *unauthorized* act is not sanctioned by notice followed by silence, it is free from embarrassment, as a few adjudicated cases will establish. If the expression "illegal act" refers to a *criminal* act, I fully concur with the Auditor; even approbation would not legalize it; but if the expression refers to an *unauthorized* act, I contend that it has "been admitted," by many "jurisdictions," that the notice and "omission to express disapprobation" does "legalize" or sanction the act, and is equivalent to an express authority. I refer to 2 Kent's Commentaries, page 616, where the commentator says: "When the principal is informed of what has been done, he must dissent, and give notice of it, in a reasonable time, and if he does not, his assent and ratification will be presumed:" "*Semper qui non prohibet per se intervenire mandare creditur:*" and in support of the principle, he cites Fowler *vs.* Stevenson, 1 Johnson's Cases, 110; Cairnes & Lord *vs.* Bleecker, 12 Jones's Rep., 300; Erick *vs.* Johnson, 6 Mass. Rep., 193; Frothingham *vs.* Haly, 3 Ibid., 70; Clement *vs.* Jones, 12 Ibid., 60; Shaw *vs.* Nudd, 8 Pickering's Rep., 9; Merlin Questions de Droit, vol. i., 482. The law of the Auditor cannot be sustained against that array of authorities, and "I cannot be wrong in asserting," "that an ~~alleged,~~" (unauthorized,) "act on the part of an inferior officer, *may be* "legalized," (ratified,) "by notice to his superior, and by the omission of the latter to express his disapprobation." My appointment was ratified

by the silence of the Department, and that silence is not *satisfactorily* accounted for, in saying that "No answer was given, owing probably to an idea entertained by the Secretary, that his views had been sufficiently expressed in his previous communication," so as to defeat the legal consequence of that silence. Can it be tolerated, that respectful communications, relating to official duty, are to be disregarded, even if the subject of the communication had before been fully disposed of; much less, when disorganization is the result of that silence? Had the Commander-in-chief pertinaciously annoyed the Department, on a subject which had been explicitly disposed of, the communication should, nevertheless, have been answered, and the appropriate remedy resorted to; and the omission to answer the letter in question, is not to be attributed to negligence, or abuse of authority, but rather approbation is to be intended from the course which has been pursued.

The Auditor says, "a positive order, or declaration of the Department, was necessary to make a proceeding valid which before was invalid." I insist that silence sanctioned my appointment; that the confirmation of my successor's appointment to the Grampus, sanctioned it; and that, *to defeat* such an implied sanction, "a positive order, or declaration of the Department, was requisite." A *positive order should have been issued to dispose of me*, if the Department did not contemplate to confirm my appointment.

My duty was unhesitating obedience to the Commodore's order. The order was positive, "to repair on board the U. S. Frigate Constellation forthwith, and assume the duties of that station," (the station of Flag Captain.) Disobedience would have hazarded my commission. Thirty year's service has taught me, that prompt and cheerful obedience of orders is of the deepest importance, and constitutes the first duty of an officer.

If the appointment was not sanctioned, it follows that, having been detached from the Grampus, I was in fact placed on *leave of absence, put off duty.* Suppose I had assumed the ground now occupied by the Auditor, that a "positive order, or declaration of the Department, was necessary to render the proceeding valid," and on finding the appointment of my successor confirmed, and no "positive order or declaration" made as respected me, had left the ship, and for so doing been put on trial for disobedience of orders, could I have defended myself on that ground? It certainly would have been a dangerous experiment. I pursued the only course dictated by duty, and should not be prejudiced by the miscarriage of

my superiors. Difficulties encountered me on every side: I had lost command of the Grampus; could not leave the Constellation; was obliged to discharge the duties belonging to those of a superior grade," and am not to be compensated for them as the Act prescribes.

I have stated that the appointment received a *collateral* sanction in the confirmation of my successor to the Grampus, and cite Loraine *vs.* Cartwright, 3 Mason's Rep. 154, when Mr. Justice Washington, under his 3rd Inquiry, says: "There is no doubt but that a principal may ratify the act of one who has acted in his behalf as his agent, though without authority, or who has transcended his powers, and in this way give validity to the act, as if it had been strictly authorized in the first instance. *This ratification may take place not only directly, but by collateral acts.*" In my case, the "collateral act" is the confirmation of my successor.

The claim was virtually allowed by the Secretary, in *the terms of reference* to the Auditor, on the 6th October, 1838, as stated in the following letter:—

"NAVY DEPARTMENT, 10th Oct., 1838.

"SIR:—Your communication of the 26th ult. has been received. In answer, I have to state, that your papers have been referred to the Fourth Auditor of the Treasury, *with the request that he will pay you what the law or the regulations of the service will justify.*

"Leave of absence will be immediately transmitted to you, according to your request.

"I am, sir, very respectfully, &c.,

JOHN BOYLE,

Acting Secretary of the Navy.

"Commander JAS. McMCINTOSH,

Boston, Mass."

In the Auditor's letter of 13th of October, he says: "One of the papers referred to, was an order from Commodore Dallas, dated August 14th, 1837, appointing you Flag Captain of the Squadron under his command, and the other was a letter from the same officer on the subject."

It is not torturing the direction of the Secretary, to "pay me what the law or the regulation would justify," *at the same time enclosing my appointmeut as Flag Captain*, to say that the Auditor *had merely a ministerial duty to perform;* that the appointment was

communicated as a guide in the allowance of pay, and precluded him from *looking behind* that appointment, any more than he would have the right to look behind my present commission, *to ascertain whether it had been issued with all the forms appointed by law.* The effect of communicating my appointment, was to inform the ccounting officer that I had been appointed Flag Captain, and it was his province only to compute the amount due.

It was again *absolutely* and *positively* allowed by Mr. Paulding, on the 12th of October, 1840, in advising the Auditor, "that it appearing there was in fact no law prohibiting the allowance, but a regulation only, which might be modified or dispensed with at the discretion of the Department, the claim, (for pay of Flag Captain from the 14th of August, 1837, to the 3d of September, 1838,) *was allowed.*" Notwithstanding that decision, the Auditor held that the allowance was against *law.* I have shown he was therein mistaken. On the contrary, the regulation interposed the only disability, and that was removed by the Secretary.

The Auditor, however, suggested another doubt: he says, "There is no doubt that the Department has a right to modify or dispense with its rules prospectively, but it admits of a serious question, at least, whether a rule can be made, altered, or repealed, to affect a previous transaction, in which the rights of an individual or government are concerned, and thus to produce the effect of an *ex post facto* law. I do not consider it necessary, however, in the decision of this case, to determine the point; for any change, at the present time, of the rules which operated to prevent Commander McIntosh from receiving the pay of Flag Captain at the time when the services for which he claims were performed, would be, in effect, an alteration of the Act of Congress."

Is the proposition sound, that Mr. Secretary Paulding had not the right, retrospectively, to remove the disability which the *regulation* interposed to the allowance of the claim. Unquestionably it will not be contended, that Mr. Dickerson had not that right, as one of the great points of the case, made by the Auditor, is the question of sanction, who admits that if the appointment had been sanctioned by Mr. Dickerson, the claim would be allowed. If so, the same right devolved on Mr. Paulding. That authority is an incident to the office, not the incumbent; the office never dies, and the powers follow the succession. There is no law limiting, in point, of time the exercise of the dispensing power of the Secretary of the Navy; the office is the same, whoever administers it. If it

is an inherent power of the office to modify or dispense with its rules, who is to set up a *statute of limitations* to the exercise of that power? It is true, there is always a delicacy on the part of a successor to reverse the decisions of his predecessor; still the authority exists. Mr. Paulding, in a sound discretion, exercised his prerogative, and it should not have become the subject of the Auditor's comment.

The preceding observations are respectfully offered, to establish, that the Accounting Officers of the Treasury erred in disallowing a claim for services rendered to the United States, marked with every evidence of merit. I have shown that in law it should have been admitted, and that the reasons assigned for its rejection do not justify that measure. I do not design to impugn the motives of the Auditor, but am assured he has arrived at that disagreeable result, alone, from a conscientious discharge of a public duty; his letters abound in acknowledgments of the *hardship of my case*, and state, "*that, had he an equitable discretion, he should certainly have been induced to allow me more.*" Placed in a false position by orders requiring implicit obedience, I have been exposed to serious expense and domestic inconvenience; was removed from an independent command, and deprived of the emoluments incident to it, arising from commissions payable on the transportation of specie, under the favorable circumstances presented by the existing difficulties of Mexico with other powers, as received by the Commanders of the other vessels of the Squadron, under the provisions of 23rd Article of the 1st section of the Act, entitled, "An Act for the better government of the Navy of the United States," approved 23rd April, 1800. I have also been prevented from availing myself of opportunities to command sloops of war, committed to my juniors, to which my date of commission entitled me.

All of which is respectfully submitted.

JAMES Mc Mc INTOSH,

New-York, Nov. 23rd, 1843. Commander, U. S. Navy.

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